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TEXT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

Nos. 606, 610, 619

LOUIS BUCHALTER, EMANUEL WEISS, and LOUIS CAPONE,

Petitioners,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The petitioners seek a review of the judgments of the County Court of Kings County, State of New York, dated December 2, 1941, convicting them of the crime of Murder in the First Degree. Upon appeal to the Court of Appeals, the highest court of the state, the cause was heard and, after due deliberation, the judgments of conviction were affirmed, the remittitur being filed on October 30, 1942 (R.

4091-4099). Thereafter, petitioners made a motion for reargument of the appeal (R. 4099-4100) and for a stay of execution of the sentence (R. 4120). The motion was denied on November 25, 1942 (R. 4120-4121).

On December 3, 1942, a hearing was had before the Honorable Charles Poletti, then Governor of the State of New York, to determine whether there was any reason for extending clemency. Before decision thereon could be made, petitioners applied to Mr. Justice Roberts of this Court for a stay of execution pending their applications for writs of certiorari. The stay was granted on December 5, 1942. No decision has therefore been made on the application for clemency.

Questions Presented.

Buchalter contends that he was denied due process of law guaranteed by the Fourteenth Amendment of the Federal Constitution, because of (Buchalter's Pet., pp. 39-40, 47, 56):

1. the denial of his motions for a change of venue to a place "outside the City of New York" (R. 76-77, 155, 165, 175) where, as he alleges, "public opinion had been irrevocably prejudiced against him by a lengthy series of newspaper articles and interviews, and where local passions were inflamed and prospective jurors had been conditioned to assume his guilt";

2. the denial by the trial court "to postpone the time of trial";

3. "the refusal of the Court of Appeals of New York to review the rulings of the trial judge upon the challenges to prospective jurors and to jurors impaneled;"

4. "the refusal to make available to him certain official records of the Police Department of the City of New York so as to permit him to call as witnesses police officers of the City of New York, to the end that

such officers might be examined concerning their observations at a time and place vitally material to the charges against petitioner;"

5. "the repeated unfair rulings and comments of the trial court during the cross-examination of witnesses for the prosecution, and by the rulings, comments, charge and conduct of the trial court, belittling the defense and improperly construing for the jury the probative force of evidence adduced, so that the jury was misled;"

6. "the refusal of the trial court to rebuke and repress improper, prejudicial and untrue statements by the prosecuting attorney in his summation to the jury;" and

7. "the decision of the New York State Court of Appeals" in which "requirements of due process of law were ignored".

Weiss (Petition, pp. 5-6) and Capone (Petition, pp. 36-38) urge substantially the same contentions, except that Capone also adds that he was deprived of his constitutional rights by:

8. the denial of his motion for a trial separate from Buchalter, who, as Capone's counsel alleged in the application for a severance, "is a person of national prominence * * *, whose career has been painted from coast to coast as the ruler of a criminal empire" (R. 36, 42); and

9. the affirmance by the Court of Appeals of "a judgment based upon evidence admittedly 'not strong', without proper corroboration of the discredited and unreliable co-conspirator".

Record Facts Material to the Questions Presented.

General Outline of the Case.

Petitioners "were represented by able counsel during a trial which lasted about eleven weeks. The record of the trial consists of more than four thousand pages in addition to the twenty-seven hundred pages containing the examination of talesmen" (R. 4030; 289 N. Y. 181, 182). In these lengthy proceedings petitioners were "zealously—even hotly—defended by experienced counsel" (R. 4072; 289 N. Y. at p. 224, per Lehman, Ch. J.).

Buchalter tells us that the trial was "a mere sham" (Petition, p. 27). The record, however, shows that at every stage of the proceedings the requirement of due process of law was fully observed. Indeed, with the single exception of Capone's obviously flimsy assertion that under "the Constitution of the United States" he was entitled to a separate trial (R. 36-37), the able counsel for petitioners never complained, either prior to or during the trial, of any deprivation of a right, title, privilege, or immunity under the Federal Constitution. The record facts in this respect will be treated more fully hereafter in support of our contention that there is no jurisdiction to review the questions presented. For present purposes, we confine ourselves to a general outline of the case, which we believe will help to reveal the lack of merit to the claims now made.

The facts—not newspaper gossip or distorted paraphrasing of the record—are set forth with reasonable fullness in the majority opinion of Judge Conway (R. 4030-4069; 289 N. Y. 181-221) and need not here be repeated in detail.

Briefly stated, the evidence established that in July, 1935 the Governor of the State of New York appointed an Extraordinary Special and Trial Term of the Supreme Court for the purpose of inquiring into "all acts of racketeering" and "all organized crime". Mr. Thomas E. Dewey was designated to conduct the investigation as special prosecutor (R. 1370-1375, Peo's. Exh's. 33 and 34).

At that time Buchalter, referred to by the witnesses throughout the trial as Lepke, was a leader of organized crime, who for years had thwarted apprehension and punishment. It is unnecessary to discuss the evidence showing his defiant criminality. It will suffice to quote the admissions of *his own counsel* in summation to the jury. "Lepke", he said, "was not just an ordinary racketeer" (R. 3589). At the time of the Dewey investigation he was being looked for "as king of the flour racket and king of the crime racket" against whom there were "thousands of complaints in extortion totaling a half a million dollars" (R. 4032; 289 N. Y. at pp. 184-185).[1]

Far more significant than counsel's admissions, however, was Buchalter's technique of circumventing the law as revealed by him to the people's witness Edward C. Maguire, a member of the Bar. It was:

> "If witnesses are not available, investigations collapse" (R. 4037, 4038; 289 N. Y. at pp. 189, 191).

In line with this method of preserving his criminal organization Buchalter ordered his henchmen to kill Rosen, because Rosen refused to stay away from the State of New York while the Dewey investigation was on and threatened to disclose how Buchalter with the aid of corrupt labor union officials had deprived him of his clothing-trucking business (See facts discussed in Judge Conway's opinion, R. 4033-4045; 289 N. Y. at pp. 185-198). Buchalter's order was carried out by Weiss, Capone and others; Weiss fired the shots, Capone planned the escape (Id.).

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1. The jury was apprised of these facts by Buchalter's counsel, not the district attorney, in an attempt to induce the jury to believe that Buchalter, having committed only "a possible misdemeanor" against Joseph Rosen and having many more serious charges to worry about, would have no motive to order Rosen's death (R. 4031-4032). The fact, however, remains that any impression a juror might have received about Buchalter from casual reading of newspaper stories faded into insignificance when faced with such disclosures by one who represented Buchalter's interests.

Nor was this all. After successfully thwarting the investigation for about one year, Buchalter was faced with the refusal of Max Rubin, "a key witness in the trial of the instant case" (R. 4064), to continue to remain in hiding outside of the City of New York. As a warning, Buchalter asked Rubin how old he was, and, on being told, said, "It was a ripe age" (R. 4037-4038). Thereafter Weiss was informed that Rubin was "squealing" (R. 4039). In the words of the majority opinion of Judge Conway,

> "Lepke (Buchalter) as well as Weiss and Capone realized the key position and importance of Rubin in case of the trial of any charge growing out of the Rosen murder, * * *. From their standpoint it was necessary to remove Rubin and so prevent him from testifying against them. This was in line with Lepke's statement to Mr. Maguire that, 'If witnesses are not available, investigations collapse'" (R. 4064; 289 N. Y. at pp. 216-217).

Accordingly, a few days after Rubin testified before the grand jury he was shot through the head as he was walking to his home (R. 4049, 4050). The shooting was planned and directed by Weiss (R. 4039-4040).

Fortunately, however, Rubin survived. Thereupon, Weiss enlisted the aid of Capone and a new plan was evolved "to get rid of him". But Rubin was then under police protection, and so their plan was abandoned (R. 4040, 4041-4042).

In so far as the defense is concerned, none of the petitioners took the witness stand. Capone offered no defense whatever. As to Buchalter, Judge Conway said (R. 4058; 289 N. Y. at pp. 210-211):

> "* * * so weak was his defense that great harm might have been occasioned to Lepke if the court had attempted to analyze the testimony of the witnesses called by him."

And Chief Judge Lehman in his concurring opinion added (R. 4075; 289 N. Y. at p. 227):

> "Argument not without weight might, indeed, be made that any attempt to present in the charge a statement or summary of the testimony of the witnesses produced by the defendants would inevitably disclose the lack of substance of such testimony."

Finally, before the judgments of conviction were affirmed the Court of Appeals permitted six hours of oral argument, accepted voluminous briefs filed by petitioners (R. 4115), deliberated on the case from June to the end of October (R. 4091-4092) and wrote exhaustive majority and dissenting opinions which show a most careful and conscientious consideration of the points then raised.[2]

Judge Conway held that reversible error was not committed, that the guilt of Buchalter and Weiss "was clearly established", and that Capone's guilt "was peculiarly a jury question" which was "properly left to the jury" (R. 4069; 289 N. Y. at p. 221). The ultimate findings of Chief Judge Lehman should also be noted. He said:

> "Joseph Rosen was killed on September 13, 1936, in circumstances which leave little room for doubt that he was shot by a gang of criminals to promote the nefarious purposes of the gang. * * * The accusing witnesses *and the defendants* were, as I have said, members of a gang or, at least, had close relations with leaders of a gang engaged in criminal practices nefarious even beyond the imagination of any fiction writer unless he had the genius of a Balzac.[3] * * * The ver-

2. We are told by Buchalter that, "although petitioner's appeal resulted in the publication of extensive opinions by the court and he was accorded all the outward indicia of a review, he was in fact given only a *semblance* of it" (Petition, p. 34).

3. For example: one of Buchalter's regular employees admitted participation in *six* murders and crimes such as slugging, strikebreaking, throwing "stink bombs" and robbery (R. 4040, 4041); one of Capone's employees participated in two murders, shot several persons, committed several assaults, and stole fifty or more automobiles (R. 4041).

dict of the jury rests, it is plain, on the conclusion that the story of the People's witnesses is credible and furnishes proof of the defendants' guilt beyond a reasonable doubt, in spite of the pollution of the source of the proof. * * * The jury has appraised the evidence and in my opinion it cannot reasonably be said that any ruling of the trial judge which is challenged on this appeal may have affected that appraisal. * * * I recognize that no intrusion by the trial judge upon the field reserved for the jury may be lightly disregarded. Even so, I conclude that in this case the errors viewed as a part of a long trial could not have affected the verdict. It is difficult, perhaps impossible to avoid all error upon such a trial, but the vital question involved was so plain and the meaning of the challenged parts of the charge so obscure that I cannot believe that the jury was misled. * * * Because I have no doubt that the errors did not affect the verdict I am constrained to vote to affirm" (R. 4069, 4076, 4077, 4078; 289 N. Y. at pp. 222, 228, 229, 230).

The Time of Trial.

Buchalter asserts that "Time and place were manipulated by the prosecution to prevent a fair trial" and that he was tried "at a carefully selected time when the trial itself could be exploited in the interests of a local political campaign" (Petition, pp. 24, 41).

Let us see.

The indictment was filed on May 28, 1940 (R. 25). At that time Weiss was a fugitive from justice (R. 4040; 289 N. Y. at p. 192). Buchalter was serving a term of imprisonment in the Federal Penitentiary at Leavenworth, Kansas, under a sentence of the United States District Court for the Southern District of New York (R. 126). It was not until April 6, 1941, that Weiss was apprehended by agents of the United States Bureau of Narcotics in Kansas City, Missouri, where he was hiding out under an assumed name (R. 4040; 289 N. Y. at pp. 192-193).

Immediately upon Weiss' apprehension the district attorney requested the Attorney General of the United States for his consent to the production of Buchalter for trial in Kings County. The Attorney General gave his consent on April 25, 1941. Thereupon, habeas corpus proceedings were promptly instituted, and Buchalter was transferred to New York City (R. 127).[4]

On May 9, 1941, he was brought to the County Court of Kings County to be arraigned on the indictment. He requested that he first be permitted to confer with members of his family, who were in the courtroom, "about getting counsel" (S.M., May 9, 1941, pp. 1-2).[5] The prosecuting attorney said, "I take the position that he is entitled to have counsel at all stages of the proceedings" (S.M., id. p. 1). The request was granted, and then the court was informed that Buchalter desired an adjournment so that he could "get counsel to appear for him on the arraignment". This was consented to, and the matter was adjourned (S.M., id. pp. 5-6).

Twenty days later he appeared by counsel of his choice, who refused to submit to the jurisdiction of the court, stating, "defendant stands mute" (S.M., May 29, 1941, p. 2). The prosecuting attorney objected to any further delay. He said:

> "The arraignment has been adjourned now three weeks. It is about time that issue was joined to the end that a trial date may be fixed" (S.M., id. p. 7).

Thereupon, a plea of not guilty was entered by the court and, over the objection of Buchalter's counsel, the trial of

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4. This was in accord with the decision of *Ponzi* v. *Fessenden*, 258 U. S. 254.

5. The transcript of the proceedings of May 9, 1941, and of other proceedings hereafter referred to, particularly the examination of talesmen, are not in the printed record, but are in typewritten form on file with this Court. The letters "S.M." refer to those transcripts.

the case was set down for July 14th (S.M., id. pp. 10-12). In noting his objection counsel urged that,

> "the case ought to go over until *September*" (S.M., id. p. 11).[6]

Buchalter's next move was to sue out a writ of habeas corpus in the United States District Court for the Southern District of New York, seeking to be transferred back to Leavenworth. He contended, among other things, that the Attorney General had no right to order his removal to New York City for the purpose of standing trial in Kings County. The writ was dismissed on June 19th, an opinion being written by District Judge Conger (R. 127). Thereupon, counsel applied to the Circuit Court for leave to appeal from the dismissal of the writ and for a stay of the trial pending the determination of the appeal. The application was heard by Judge Learned Hand, who denied the request, stating that the arguments made in support thereof were "absurd" (S.M., August 4, 1941, pp. 20-21).

Soon thereafter (June 23, 1941) the district attorney made a motion for an order directing the drawing of a panel of special jurors to attend at the trial on July 14th, the date originally fixed by the court (R. 127). The affidavit in support of this motion stated that the district attorney intended to proceed with the trial "*not later than July 14, 1941*" (See certified copy printed in Appendix hereto).[7] Counsel for petitioners consented to be tried by a special jury (R. 4068; 289 N. Y. at pp. 220-221), but objected to the date of trial upon the ground that it would

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6. Ultimately, the trial did not commence until September 15th (R. 177).

7. The affidavit submitted in support of the motion for a special jury, the answering affidavits and the order of the court were not printed in the record. Because of their importance we obtained permission from the Clerk of this Court by letter dated Dec. 24, 1942, to file certified copies and to print them in the Appendix to our brief.

not afford them sufficient time to prepare their defense (R. 128). On behalf of Buchalter and Weiss affidavits were filed requesting, for the second time, that the trial be set for *September*. We quote from the affidavit of Buchalter's counsel, sworn to June 25th (see Appendix):

> "13. I respectfully request that the trial of this case be set for a day not earlier than the first week of September. All of the intervening interval between that date and today is needed for the preparation of the defense."

Similarly, counsel for Weiss in the last paragraph of his affidavit said (see Appendix):

> "and deponent respectfully asks that the case be set down for trial for some time in the month of September, at which time deponent will be properly prepared for trial."

As a result of these requests the court, in granting the motion for a special jury—to which counsel had consented—directed that a panel of two hundred and fifty talesmen be drawn, and adjourned the trial date to August 4th (R. 128, certified copy of order printed in Appendix). The provisions of said order were, after timely notice to petitioners, complied with on July 8th, a Justice of the Supreme Court presiding at the selection of the panel (R. 128).

Eight days later, however, the people were faced with a new dilatory move, which was designed to delay the trial for several months. For despite their previous consent to proceed to trial before a special jury drawn from the citizens of Kings County, pursuant to which two hundred and fifty talesmen were already drawn and notified to appear in court (R. 128, 165), petitioners decided to apply for a change of venue to a place "outside the City of New York" (R. 76-77). The controlling facts concerning their application will be discussed hereafter. At this point, it suffices to note that after a full hearing in the Supreme Court their motions were denied (R. 167-168), the opinion

of the court holding that there was "no merit" to their contentions (R. 165-166).

This brings us to a series of obstructionist tactics the likes of which are rarely encountered. We shall try to state the facts as briefly as possible.

When the case was called for trial on August 4th, the district attorney stated he was "ready" (S.M., p. 2). Counsel for Weiss said, "defendant Weiss is ready" (Id.). Counsel for Buchalter, however, said,

> "This defendant refuses to answer ready, because he has not been afforded a reasonable opportunity to properly prepare his defense. He, by virtue of that, maintains that he cannot receive a fair trial" (S.M., p. 3).

In support of this position counsel asserted that they "deemed it necessary" to interview Buchalter's former associate, Jacob Shapiro, who was then a Federal prisoner and who "could and would give information *vital and essential to the defendant's defense*"; that to enable them to use Shapiro as a witness they sued out a writ of habeas corpus in Atlanta, Georgia, but that the Federal Director of Prisons caused Shapiro's transfer to Springfield, Missouri, "*as a device to avoid an order on the writ*" (S.M., pp. 3-6). It was further contended that an application was made to the Federal Director of Prisons for permission to interview Shapiro but that such permission was "bluntly" refused (S.M., pp. 6-7); and that although the Attorney General of the United States turned Buchalter over to the state authorities for trial, "he has deprived him of the opportunity to prepare and present his defense" (S.M., p. 17).[8]

8. The trial court and the district attorney agreed to arrange with the Attorney General of the United States to have Shapiro transferred to a Federal prison in New York City where he could be interviewed (S.M., pp. 36-38). The record does not disclose the result of whatever steps were taken. But it is significant that Shapiro was not called as a witness and that no claim has ever been made, not even in the present petitions, that the defense was deprived by either the Federal or State authorities of an opportunity to interview or call Shapiro as a witness.

In the course of this argument counsel for Weiss changed his mind and said, "I answered ready on Weiss, but I join in the application that has just been made" upon the ground that "Buchalter has not been permitted to confer with Weiss and vice versa, in the detention pen in which they have been confined since their arrest" (S.M., p. 11).

The court denied the motions and marked the case ready for trial (S.M., p. 28).

Thereafter an unprecedented situation developed. Out of a jury panel of 250, all but 95 either failed to appear or presented excuses to be relieved from service (S.M., p. 31). In evaluating this condition the trial court said:

> "This jury situation is unprecedented. It is practically a run-out. The reason for it may be reluctance to give protracted service during the hottest month of the year. There is merit to that position. To arbitrarily combat it would smack of coercion and would tend to undermine that quality of jury service which is essential for a fair trial of this case" (S.M., pp. 53-54).

Moreover, it was apparent that with thirty peremptory challenges and an unlimited number of challenges for cause available to each side (N. Y. Code Crim. Proc. § 373), a jury could not be obtained out of the limited number of talesmen willing to serve. That this was so is evident from the fact that when the trial did begin a panel of 250 was exhausted and a new panel of 100 was required before the selection of a jury was finally completed (S.M., pp. 2019-2024). Under these circumstances the prosecuting attorney suggested that the case be adjourned until September (S.M., p. 35).

When the court indicated that it would grant the request, counsel for Buchalter, who, as we have noted, had previously urged that the case be set down for September and who, only a few hours before, had refused to answer ready upon the ground that the defendant had "not been afforded a reasonable opportunity to properly prepare his defense" (S.M., p. 3), suddenly announced that

he was fully prepared and opposed the adjournment in these words:

> "*We are as ready as we will ever be* and if we can get permission to interview Jacob Shapiro, we will not delay the trial one minute" (S.M., p. 39).[9]

Thereafter, counsel for Weiss thought of the idea of using the fact that the trial judge was a candidate for re-election and the district attorney a candidate for mayor as a reason for requesting that the trial either proceed immediately or else be adjourned *for three months* until after election (S.M., pp. 39-43). This appealed to Buchalter's counsel who joined in the request, stating, "The counsel for defendant Buchalter join in the comments of Judge Talley and adopt his reason for requesting an adjournment as our own" (S.M., p. 43).

The trial court in adjourning the case until September 15th said:

> "Any delay of trial in any case involves hazards in relation to witnesses, in relation to evidence. Therefore any delay of any trial must be weighed against those hazards. No prejudice can come from trying the case before election because, sensibly, no juror will be influenced by his political views in deciding the question of guilt or innocence in a capital case" (S.M., p. 54).

The Place of Trial.

We have seen that on June 23, 1941, the district attorney made a motion for an order directing that the case be tried by a special jury in the County Court of Kings County. This motion was made pursuant to the provisions of Section 749-aa of the New York Judiciary Law (R. 127), which permits the defendant or the district attorney to

9. In view of the foregoing facts, Buchalter's statement at page 17 of his petition that, "The sincerity of counsel was matched by the dissimulation of the presiding Judge", is indeed ironical.

apply for such a jury where the subject matter of the indictment "has been widely commented upon" (Id. subd. 4; R. 173). To qualify as a special juror the statute (subd. 2) provides (R. 4068; 289 N. Y. 181, 221),

> "No person shall be selected as such special juror * * * who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression * * * or who avows that he cannot in all cases give to a defendant who fails to testify as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify as a witness in his behalf shall not create any presumption against him."

We have said that petitioners consented to be tried by such a jury drawn from the citizens of Kings County, but objected only to the date of trial. The order granting the motion recites (certified copy printed in Appendix):

> "* * * and Hyman Barshay, Esq., attorney for the defendant, Louis Buchalter, alias 'Lepke'; James I. Cuff, Esq., attorney for the defendant Emanuel Weiss, alias 'Mendy Weiss'; Saul Price, Esq., attorney for the defendant, Philip Cohen, alias 'Little Farvel'; and Leon Fischbein, Esq., attorney for the defendant, Louis Capone, *appearing and consenting to the granting of the motion for a special jury* * * *."

The opinion of the court denying petitioners' subsequent motions for a change of venue stated, among other things, the following (R. 165):

> "Upon a motion by the District Attorney for an order directing the trial before a special jury on July 14th, 1941, the moving defendant, as well as the defendants, Weiss and Capone (who seek similar relief in separate motions), *consented to a special jury* and objected solely to the trial date inasmuch as it would not permit sufficient time to prepare."

And the Court of Appeals, in reviewing the decision of the Supreme Court, found that,

> "Each of the defendants *consented* to be tried before such special jury" (R. 4068; 289 N. Y. at pp. 220-221).

Now comes Buchalter's petition wherein, at page 50, he tells us that,

> "Petitioner's counsel had not consented. The papers on that motion are a part of the record; from them it clearly appears that the court at *nisi prius* in granting the motion for a special jury *misstated the fact* in recording that there was consent."

The final answer to this reckless assertion is to quote from the affidavit filed with the court below by Buchalter's counsel (certified copy printed in Appendix). He there said:

> "6. No objection is made on behalf of my client to that aspect of the motion which seeks an order for the trial of this case before a special jury."

Counsel for Weiss likewise consented. In his affidavit he said (printed in Appendix):

> "That deponent does not oppose the application for the trial of the indictment before a special jury, but deponent does oppose that part of the application which seeks to have the trial set for July 14, 1941. * * *."

Pursuant to these consents, the order directing the impanelling of a special jury of 250 talesmen was, after due notice to petitioners, duly complied with (R. 128, 165).

Eight days later Buchalter made a motion in the Supreme Court to transfer the trial to a county "outside the City of New York" (R. 76-77, 165). He urged that he could not receive a fair trial in the City of New York because of the fact that for "the past two years" he received widespread

notoriety by newspaper, *radio* and magazine" (R. 77, 121) "as societies most dangerous enemy", as the "master mind" of all criminals, and as "a vicious racketeer" who not only directed the murder of Rosen but of many others (R. 76-109).

Weiss and Capone joined in the motion, their argument being that because of the unfavorable newspaper and radio notoriety received by Buchalter, they, as co-defendants, would be indirectly affected by the alleged prejudice against Buchalter if they were to be tried together in any county of the City of New York (R. 129, 4123-4126).

Significantly, not a single affidavit of a resident of the community was submitted to show that there existed any prejudice which would prevent a fair and impartial trial. The record shows that the applications were based solely upon the speculation and surmise of counsel and the report of a hired investigator whose affidavit was patently worthless (see Justice Daly's opinion, R. 166). The affidavit of Buchalter's brother, discussed at page 27 of Buchalter's petition, was even worse than the one submitted by the hired investigator. In that affidavit the brother asserted that an assistant district attorney who was assigned to try the case, but whose name he did not disclose, told him that "current prejudice existing in this locality against the defendant, Louis Buchalter, is so strong that the mere making of any charge against him would result in his conviction" (R. 111). It was evident from the very wording of the alleged statement that it was concocted to meet the occasion. The two assistant district attorneys who were assigned to try this case denied under oath that they ever uttered, in words or substance, any such statement (R. 123-124, 131).

At all events, after a full hearing was had in the Supreme Court the motions were denied with an opinion holding that they were devoid of merit (R. 165-168).

Later, a second application, based solely upon additional newspaper clippings, was made by Buchalter before a different Justice of the Supreme Court, who likewise denied the motion (R. 155-163, 175-176).

Consonant with other reckless accusations throughout his petition Buchalter asserts, at page 24, that his second application for a change of venue "received only the pretense of consideration".[10] The order of the court, however, recites,

> "* * *, and after hearing Jesse Climenko, Esq., attorney for the defendant in support of said application, and Burton B. Turkus, assistant district attorney, in opposition thereto, and due deliberation having been had, and upon filing the opinion of the court, it is * * * ordered etc." (R. 176).

It would be unnecessary to discuss other facts relating to the motions for a change of venue, were it not for the omissions and inaccuracies in the petitions filed in this Court. In view of the extreme length of the record, we think it will be of help to call attention to some of them.

1. Each petitioner, in slightly different language, conveys the impression that the notoriety received by Buchalter through the newspapers "commenced" with the finding of the indictment and was particularly evident in Kings County (Buchalter's Pet., pp. 2-3; Weiss' Pet., p. 7; Capone's Pet., p. 4).

The fact is that because of his criminal activities for many years Buchalter received widespread publicity as a gangster-chieftain throughout the country (R. 129-130). It did not commence in 1940, but long antedated the present indictment. The New York Times Index reveals that the notoriety given to Buchalter's record in crime dates back to at least the year 1935 (R. 45-54, 129-130). Every time, and it was often, that he or his associates came into conflict with the law, an alert press naturally commented upon it.

10. We have already noted that at page 34 of his petition Buchalter makes a similar accusation against the Court of Appeals where, he says, he was given "only a semblance" of a review. It seems that the courts of the State of New York have formed an unholy alliance against Buchalter.

We select but a few examples from reports in the New York Times.

In 1935 and 1936 Buchalter was under investigation by District Attorney Dewey as the controller "of all major rackets" (R. 45-46). In October, 1936, the United States Circuit Court of Appeals affirmed the conviction of Jacob Shapiro but reversed that of Buchalter (R. 46). In September, 1937, Buchalter and Shapiro were named in an extortion indictment (R. 46). In November, 1937, Buchalter and Shapiro were sought in connection with an anti-trust prosecution involving the fur industry, resulting in the Government posting a reward for information leading to their arrest (R. 46). In June, 1938, testimony given in a court proceeding revealed the use of "threats and pressure" against dealers in the fur industry and that "payments were made to Buchalter and Shapiro" (R. 47). In July, 1939, District Attorney Dewey requested an increase in the amount of the reward offered for the apprehension of Buchalter, who was then wanted in connection with the "Garment and Bakery Racket Cases" (R. 47). In August, 1939, Buchalter surrendered to the Federal Bureau of Investigation (R. 48). In the same month he was arraigned on a Federal indictment charging him with "narcotics smuggling" (R. 48). In December, 1939, during Buchalter's trial in the Federal court a witness sought by the Government was found "slain" (R. 50). That month Buchalter was convicted (R. 51). In January, 1940, he was transferred to New York County to be tried on the charges pending against him; he refused to plead to the indictment until the Federal courts denied his application to prevent the state prosecution (R. 53). And in March, 1940, he was again convicted (R. 52).

It is thus apparent that the notoriety given to Buchalter's criminal activities did not commence in May, 1940, when the present indictment was found. Nor can it be said that the newspaper comments were limited to any particular

locality. As was said by Mr. Justice Daly in denying the motions for change of venue (R. 165-166),

> "It is evident, however, that such notoriety was not confined to the metropolitan press, which circulates throughout the country, and certainly was not limited to radio listeners in the city and state of New York."

In short, to quote from the affidavit of counsel for Capone filed June 5, 1941, on his application for a separate trial,

> "The defendant Louis Buchalter, alias Lepke, is a person of national prominence * * * whose career has been painted from coast to coast as the ruler of a criminal empire" (R. 36, 42).

So too, counsel for Weiss in a similar application on August 4, 1941, stated (S.M., p. 25):

> "Louis Buchalter, generally known as Lepke, is hailed throughout the press *of not only this county* but of the city *and I dare say the country at large*, as the leader of a band, etc."

In the final analysis, therefore, the sole question on the motions for change of venue was whether because of newspaper comments there existed in the County of Kings such prejudice and passion as to prevent a fair trial. Upon that question Mr. Justice Daly said (R. 165-166):

> "After a careful consideration of the application herein, the court is of the opinion that there is no merit thereto. The papers do not establish by convincing proof that the defendant, by reason of prejudice or passion, cannot obtain a fair trial in this county. * * * 'If newspaper articles furnished ground for removal, no defendant could ever be tried for a spectacular crime' in the county of indictment. (*People* v. *Brindell*, 194 App. Div. 776.) * * * It is inconceivable that in a cosmopolitan community such as Kings County,

with a population of over two million people, a jury cannot be found, qualified to fairly and impartially try the defendant on the evidence."

Such a jury, we shall soon prove, was in fact obtained.

2. In discussing the newspaper notoriety Buchalter charges that "it is beyond cavil" that the prosecuting attorney "was responsible for this propaganda" (Pet., p. 48) and that,

> "Petitioner contends here, *as he contended below in the Courts of New York*, that the prosecutor succeeded in creating assurance of his guilt in the minds of the community in which he was to be tried * * *" (Pet., p. 3).

A sufficient answer to this accusation is to be found in the affidavit of Buchalter's counsel on his application for a change of venue. He there said:

> "Thus the question of whether reporters whose statements appear under their signature and who purported to quote the District Attorney of Kings County or his associates were unauthorized so to do, *is not a problem presented on this application.*
>
> * * * * *
>
> *No doubt many of the quotations attributed to the District Attorney of Kings County and his various aides as set forth in the exhibits annexed to this affidavit, were improper in the sense that they were made without authorization*" (R. 87, 108). (Italics ours.)

3. Finally, Buchalter also charges at page 37 of his petition that,

> "the Court of Appeals refused to review the question of whether * * * a change of venue should have been granted."

This accusation is amazing. We quote from the opinion of Judge Conway (R. 4068-4069; 289 N. Y. at pp. 220-221):

> "Defendants urge that they are entitled to a reversal of the judgment of conviction as matter of law because of the denial of their motion for change of venue to another county of the State, made pursuant to subdivision 2 of section 344 of the Code of Criminal Procedure. In our judgment there is no merit in defendants' claim for a number of reasons.
>
> In the first place, the defendants were tried before a special jury drawn pursuant to article 18-B of the Judiciary Law (Cons. Laws, ch. 30). Each of the defendants consented to be tried before such special jury. The statute (Judiciary Law, § 749-aa, subd. 2) provides, 'No person shall be selected as such special juror * * * who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression * * *.'
>
> The motion was addressed to the sound discretion of the court. We are not prepared to say on this record that its denial was an abuse of discretion (*People* v. *Hyde*, 75 Misc. 407 [opinion by Mr. Justice Lehman, now Chief Judge of this Court]; aff'd., 149 App. Div. 131; *People* v. *Brindell*, 194 App. Div. 776, 781; *People* v. *Hines*, 168 Misc. 453, 470; *People* v. *Savvis*, 69 App. Div. 604). This may also be said with reference to the motions of the defendants Weiss and Capone for a change of venue and for a severance."

And in denying the motion for reargument the court said (R. 4120-4121):

> "This court did not restrict its review to a mere determination that there was no abuse of discretion as a matter of law by the County Judge in denying the motion for a change of venue. The majority of the court is of the opinion that the discretion was properly exercised."

We need make no further comment.

The Trial Jury.

1. Buchalter insists that "every talesman called was obsessed by a prejudice" and repeatedly asserts that "a fair jury was not impaneled" (Pet., pp. 27, 41, 49). Capone takes the same position (Pet., pp. 37, 63). Weiss limits his argument to "the fitness of the last two" jurors, stating that their fitness "was doubtful" (Pet., p. 11).

The record shows that the first nine jurors who participated in the verdict were pronounced "satisfactory to the defendants":

1.	Charles E. Stevens,	S.M. p.	522
2.	Chester T. Prentiss,	" "	1038
3.	Charles A. Murphy,	" "	1352
4.	David N. Day,	" "	1530
5.	Henry T. Gill,	" "	1647–1648
6.	James B. Cummings,	" "	1738
7.	George B. Hall,	" "	1861
8.	Harold S. Cross,	" "	2014–2015
9.	James R. Edghill,	" "	2566

These jurors, it is to be noted, were pronounced acceptable by the able defense counsel *when their peremptory challenges had not yet been exhausted.* Indeed before the next prospective talesman was question the defense *still had one more peremptory challenge* (S.M., pp. 2618, 2619, 2620). The statement in Buchalter's petition at pages 25 to 26 that their peremptory challenges "were exhausted before the tenth juror was selected" and the statement in Capone's petition at page 118 that the last three jurors "were all questioned subsequent to the exhaustion of the thirty peremptory challenges accorded to the defendants" are *not* correct.

We proceed to prove it. After the ninth juror was accepted two prospective jurors (Mr. Andrews and Mr. Rorke) were called for questioning. The examination of Mr. Andrews failed to disclose the slightest basis for interposing a challenge for cause (S.M., pp. 2579-2585, 2589-2603). He stated that he had formed no impression about the case or about the defendants (S.M., pp. 2591-2592) and that he knew of no reason which would prevent him from presiding as a fair and impartial juror (S.M., p. 2603). Under these circumstances the defense counsel did not interpose any challenge for cause but merely stated that they had no further questions to ask (S.M., p. 2621).

But before Mr. Andrews was challenged peremptorily, the questioning to determine the fitness of Mr. Rurke was commenced. It developed during his examination that he was the nephew of a police inspector "in charge of traffic" (S.M., p. 2603).[11] He stated that he had no impression adverse to any defendant (S.M., p. 2609), that if accepted as a juror he would "do justice" by his verdict (S.M., p. 2586) and that there was nothing to prevent him from rendering "a just verdict" under his oath (S.M., p. 2589).

As to this juror both Buchalter and Capone now state that he was "obviously prejudiced" (Buchalter's Pet., p. 26; Capone's Pet., p. 8). That they did not want him we have no doubt for they challenged him on the ground of alleged "implied bias" (S.M., p. 2609). Under the New York Code of Criminal Procedure, section 377, however (see Appendix), a juror can be challenged for implied bias for eight specific reasons, "and for no other". Mr. Rorke was not disqualified under any one of these statutory grounds. Counsel for the defense therefore appealed "to the discretion of the court" (S.M., p. 2612). The court, however, properly overruled the challenge (S.M., p. 2617).

Counsel thereupon had a discussion with the court, but not within the hearing of the jurors, which is recorded at

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11. Buchalter prefers to describe him as the nephew "of a prominent" and "high police official" (Pet., p. 26).

S.M., pages 2618-2620. In this discussion counsel urged that if their challenge for implied bias was not sustained they would be compelled to use their last peremptory challenge, which would leave them without the power of peremptorily challenging the other juror (S.M., pp. 2618-2619). The court, however, adhered to its original decision. Whereupon Mr. Rorke was again questioned. In this second examination Mr. Rorke stated that he would accord the defendants the presumption of innocence (S.M., p. 2624), that if chosen as a juror the defendants could rely upon him "for the preservation of every right that the law gives" them (S.M., p. 2627) and that if there should be a reasonable doubt of guilt in his mind he would give the defendants the benefit of such doubt (S.M., p. 2627).

If, as is now claimed, Mr. Rorke was "obviously prejudiced", why did not counsel use their peremptory challenge against him! Instead, for no reason whatever, they peremptorily challenged Mr. Andrews (S.M., pp. 2627-2628) whose fairness they at no time impugned.

We now come to Mr. Link who was the eleventh juror. He too, say Buchalter and Capone, was "obviously prejudiced" (Buchalter's Pet., p. 26; Capone's Pet., p. 8). His examination appears at S. M., pages 2660-2689. A reading thereof shows that there is not a single word to suggest any bias or prejudice. The statement of Buchalter in his petition at page 26 that "Link had been on the 'Mr. District Attorney' radio series" is misleading. The fact is that he was a radio announcer who had been consulted in connection with a fiction program called "Mr. District Attorney" (S.M., p. 2660). Typical of this man's qualifications to serve as a juror are his answers to the concluding questions put to him by counsel for Buchalter. We quote from the record (S.M., p. 2675):

> "Q. Can Mr. Buchalter as an individual depend on you and entrust to you his keeping and preservation?
> A. Yes, sir.

Q. Without any sympathy or bias or prejudice? A. Yes, sir.

Q. I take it you will consider your oath on that? A. Yes, sir."

And on questioning by counsel for Weiss he said (S.M., p. 2677):

"Q. Do you realize that if you are selected as a juror, under your oath you must determine and find according to the way you regard the facts? A. That is right.

Q. Without fear or favor or prejudice or bias? A. Yes, sir.

Q. And can you do that? A. Yes, sir."

None of the counsel challenged him for bias, actual or implied. Having used up their peremptory challenges, they merely said, "We rest on the record" (S.M., p. 2689).

As to the twelfth juror, John E. Coleman, the record shows that he was eminently qualified to serve. Two illustrations will suffice. Upon being questioned by counsel for Buchalter the juror said (S.M., pp. 2700-2701, 2704):

"Q. While you were sitting here did anything occur in the courtroom to cause favor or prejudice to either side? A. No, sir.

Q. Nothing at all? A. No, sir.

Q. I take it you realize as well as anyone else the extreme importance of getting an impartial jury? A. Yes, sir.

Q. So that now there is no prejudice in your mind, or anything at all which would preclude you from giving Mr. Buchalter a fair trial? A. Nothing.

* * * * *

Q. The law says that every defendant is entitled to a fair trial at your hands. Will you give it to Mr Buchalter? A. Yes, sir."

And under questioning by counsel for Capone (S.M., p. 2705):

"Q. Have you had any discussion at all about this case? A. No, sir.

Q. Have you formed any impression of any character in the courtroom? A. No, sir.

Q. Your mind is clear now as to the fact that you can sit here as a fair and impartial juryman and take the evidence from the witnesses? A. Yes, sir."

It is thus evident that there is no basis whatever for the assertion that petitioners were not tried by a fair and impartial jury.

2. But "the Court of Appeals", says Buchalter at page 37 of his petition, "refused to review the question of whether petitioner had been tried before a fair and impartial jury".

This is not correct. The opinion of the Court of Appeals denying his motion for reargument said (R. 4121):

> "This court examined and found no error in the rulings of the trial court upon the challenges for implied bias. On the motion for a special jury under the statute (Judiciary Law, Cons. Laws, ch. 30, art. 18-B;) the defendant appeared by attorney and consented to be tried before such special jury, a majority of this court is of the opinion that he thereby consented also to the statutory provision that rulings of the trial court upon challenges for actual bias are final and not appealable."

We have noted that only Mr. Rorke was challenged for implied bias and that as to Mr. Link and Mr. Coleman the petitioners, having exhausted their peremptory challenges, merely "rested on the record" and made no challenge for bias, actual or implied. Consequently, the holding of the Court of Appeals that by virtue of the Judiciary Law the "rulings of the trial court upon challenges for actual bias are final and not appealable" necessarily applies to challenges for actual bias made against jurors who did not participate in the verdict.

Conduct of the Trial.

1. *As to alleged supression of evidence.*

At page 30 of his petition Buchalter says:

> "Throughout a long cross-examination of that witness (Rubin), the prosecution suppressed a prior contradictory statement of the witness."

Let us look at the record. It shows that on *direct* examination of the witness Rubin, the prosecuting attorney, of his own volition, produced Rubin's prior inconsistent statement, questioned the witness concerning it, and then offered it for identification only because counsel for the defense objected to any examination as to its contents. We quote from the record (R. 1485-1486).

> "Q. Did Mr. McCarthy, the former Assistant District Attorney of Brooklyn, ask you questions about the Rosen case?
>
> Mr. Barshay: I object to it as not binding on this defendant.
>
> The Court: Overruled.
>
> Mr. Barshay: Exception.
>
> The Court: Just yes or no.
>
> The Witness: Yes.
>
> Mr. Turkus: *I ask that this be marked for identification.*
>
> (Papers marked People's Exhibit Z-16 for identification.)

Q. Do you know whether or not the questions and answers that were made at that time were reduced to writing? A. They were.

> Mr. Barshay: Same objection.
>
> The Court: Overruled.

Q. Is People's Exhibit Z-16 for identification a transcript—

Mr. Talley: I object to that, if your Honor please, as not proper examination under any circumstances.

The Court: Sustained.

Q. Does the date December 16, 1937, refresh your recollection as to the specific time when you were questioned? A. Only that you told me that was the date. I had forgotten it. It was in December.

Q. Did you in December of 1937, tell former Assistant District Attorney McCarthy *the truth* in that statement that you gave him?

Mr. Barshay: I object to it, your Honor, and I object to the form of the question. It is a self-serving declaration.

The Court: Sustained. The paper itself is not competent. Under the law it may be used only for examination to establish a possible impeachment—."

After thus repeatedly blocking the efforts of the prosecuting attorney to establish that his witness had made a prior contradictory statement, which was helpful to the defense, it is indeed brazen audacity to accuse him of suppressing the statement and, in addition, to charge that,

"No further effort was made by the prosecution to reveal the *existence* of such a prior contradictory statement" (Buchalter's Pet., p. 30).

We have not failed to note that the prosecuting attorney is charged with suppressing the statement during "cross-examination of the witness". But, here again, the record is barren of even a suggestion of any attempt to withhold from the defense the statement already marked for identification. In fact, after a lengthy cross-examination (R. 1492-1748), counsel for Buchalter concluded the interrogation as follows (R. 1748):

"Q. I forgot one question: Other than the statement you made to McCarthy, referring to one of the exhibits for identification by Mr. Turkus, in 1937, did you at

any time make a statement to Mr. McCarthy—yes or no? A. No, sir.

Q. You mean that at no time did you talk to McCarthy when a stenographer was present? A. Only that one time.

Q. That is the only time? A. Yes, sir."

But at no time during this examination, for reasons known only to defense counsel, was any request made to be permitted to examine the statement.

Later, the *prosecuting attorney* recalled the witness, and at the conclusion of direct examination Buchalter's able and experienced counsel asked the court whether they "had a right to see the statement" (R. 2377), the *existence* of which they now claim had been suppressed. The court then examined the statement, revealed the material and relevant contradictions by dictating them to the stenographer (R. 2381-2386), and said (R. 2391):

"The Court: This refers to the deposition taken by Assistant District Attorney McCarthy, who was one of the Assistants under Mr. Geoghan in an investigation that was made before Judge O'Dwyer came into office as District Attorney of this County. *You, Mr. Turkus, offered it in evidence, and it was objected to and excluded, but was marked for identification.* The Court has read parts of it to determine what is fair to allow counsel for the defense to see, for the purpose of further cross-examining this witness. Those parts have been revealed to counsel, and counsel have the right now, to cross-examine on those points."

2. *As to alleged deprivation of an opportunity to offer evidence in defense.*

At page 32 of his petition Buchalter says:

"Petitioner should have been afforded at least an opportunity to offer a defense. He, however, was denied even the pretense of such an opportunity."

In an attempt to support this complaint he relies upon the trial court's refusal "to make available to him certain official records of the Police Department of the City of New York" (Pet., p. 46; see also Weiss' Pet., pp. 28-30) which are known as "D.D. 4's". He states at page 33:

> "Petitioner contended, upon the trial, * * * that reference to the contents of those reports (if unexpurgated) would demonstrate that, as police officers of the City of New York knew and recorded at that time, petitioner did not see or talk with the witnesses thus produced against him upon the trial."

The lack of substance to the foregoing is demonstrated by the record facts. They are as follows:

Immediately before the cross-examination of the people's witness Berger, a request was made for the police reports. When the court ruled that the defense was not entitled to them, counsel for Buchalter said:

> "Mr. Barshay: * * * Whether or not the D.D. 4's had anything to do with this case, they are only concerning the movements of the defendant Buchalter in the years 1935, 1936 and 1937 in Manhattan and have absolutely no bearing upon this case" (R. 1881).

Later, in the absence of the jury, and while the witness Berger was still under cross-examination, the request for the police reports was repeated. At that time counsel for Buchalter said:

> "* * * If your Honor pleases, those are not records having to do with this case as a case but rather are they records having to do, as I understand the situation, with the work of the Police Department of the City of New York during the period from about September of 1935 to the end of 1936 in respect to the surveillance by agents of that department of one of the persons on trial" (R. 2141-2142).

The court then made the following inquiry:

> "The Court: Are they required in connection with the examination of this witness?
> Mr. Climenko: *They may be, your Honor,* * * *" (R. 2142).

Thereafter, the court asked the prosecuting attorney the following questions:

> "The Court: I am asking you this: Do they contain any Q's and A's by witnesses in this case?
> Mr. Turkus: They do not.
> The Court: Do they contain any depositions by witnesses in this case?
> Mr. Turkus: They do not.
> The Court: Are they purely police reports?
> Mr. Turkus: They are police confidential reports of activities of the Police Department.
> The Court: No depositions?
> Mr. Turkus: No depositions.
> The Court: No admissions?
> Mr. Turkus: No conversations, no admissions that I could find. They are about three inches thick" (R. 2146).

It is also to be noted that these reports were of investigations, made by police officers, of the movements of various underworld characters (R. 2142-2143).

Finally, the trial court, in denying the request, said:

> "The Court: If a policeman took the stand and testified otherwise, then the question as to whether or not these records could be used to contradict the policeman, provided they were made by him, would come up and call for a ruling, but that is not present at this moment. Now as it stands, in addition to the fact that these are privileged and confidential under the law, they are hearsay" (R. 2151).

At no time did the trial court preclude petitioners from offering any defense they pleased. At the end of the people's case petitioners were free to call the Police Commissioner, or anyone else in authority, to reveal the names of the officers who made the reports and then to call such officers to testify on any competent matter. As we have noted the court specifically informed defense counsel that "if a policeman took the stand * * *, then the question as to whether or not these records could be used to contradict the policeman, provided they were made by him, would come up and call for a ruling" (R. 2151). But counsel failed to do so, and the reason for it is revealed by the finding of the Court of Appeals which examined the police reports. The court said (R. 4120):

> "This court considered the refusal of the trial court to accord the defendant access to the records of the Police Department of the City of New York. The records in question were deposited with this court at the time of the argument of the appeal and were examined. The so-called surveillance amounted to very little. It was of the entrance and lobby of the office building and not of the floor upon which defendant Buchalter had his office. *The reports established that the defendant could and did elude the police at will.* The ruling of the trial court was correct." (Italics ours.)

3. *As to alleged restriction of cross-examination.*

Capone tells us that there was "unwarranted restriction of cross-examination by defense counsel" (Pet., p. 125; see also Weiss' Pet., pp. 5-6, 44). The fact is, as stated by Chief Judge Lehman, the "cross-examination of the important witnesses continued for days and no summary could be entirely satisfactory" (R. 4075; 289 N. Y. at p. 227). And the record shows that Bernstein's cross-examination occupies 504 pages (R. 768-1272); Berger's 288 pages (R. 1883-2134, 2156-2191, 2201-2203); Rubin's 273 pages (R. 1492-1754, 2391-2402); Magoon's 131 pages (R. 2472-2603); Tannenbaum's 110 pages (R. 2245-2353, 2368-2370).

4. *As to "armed guards", manacles, and "cordons of police".*

Petitioners make extravagant statements concerning the "atmosphere" in the courtroom. They complain that in being brought into the courtroom they were "manacled to police officers" and were "unmanacled only after the jury were in their seats and the defendants had been seated" (Weiss' Pet., p. 12). They also complain that the people's witnesses—such as Buchalter's employee Tannenbaum, a six-time murderer (R. 4040, 4041), Capone's employee Magoon, a two-time murderer (R. 4041), his employee Bernstein, an accomplice to the murder of Rosen (R. 4042), and Rubin, who was promptly shot through the head when he testified before the grand jury (R. 4049, 4050)—were brought into the courtroom by men "known to be detectives", who "had their badges on" and who were permitted to remain during the trial (Weiss' Pet., pp. 11-12; Capone's Pet., pp. 9-16).

A full description of the so-called "atmosphere" appears in the record at pages 686-690, 764-768, 1755-1756, and need not here be repeated. It is enough to say, concerning petitioners being manacled to police officers when brought to and from the courtroom, that Buchalter and Weiss were formerly fugitives from justice and at the trial were Federal prisoners in the custody of a United States marshal. They and Capone, as the record shows, were desperate criminals. [12]

In so far as the protection afforded to witnesses is concerned we add the information imparted by the trial court to defense counsel, in the absence of the jury (R. 2138):

> "At one time the situation was so desperate here that in trying a case it was deemed necessary to get an

12. For similar situations where such precautions were held to be proper see *Kelly v. Oregon*, 273 U. S. 589, 591; *State v. Temple*, 194 Mo. 237, 248; *People v. Kimball*, 5 Cal. Rep. [2] 608.

armored bank car with armed police outriders in order to escort one witness here because it was indirectly reported that there was a scheme on to block traffic and to assassinate that witness on his way to the jail. That witness is reported to have committed suicide this morning by jumping out of the eighth story window of a hotel."

5. *As to the charge to the jury.*

Petitioners place great stress upon alleged errors in the charge to the jury, which they claim were tantamount to a "direction to convict". Their argument is, in the main, based upon isolated excerpts, paraphrase and inference. The charge, as given, appears at pages 3871-3991 of the record. The parts criticized are discussed in the majority and dissenting opinions of the Court of Appeals (R. 4030-4091; 289 N. Y. 181-243). We need only add that the trial court repeatedly instructed the jury, with great emphasis, that they were the sole judges of the facts, that the credibility of witnesses was for them to determine (R. 3871, 3880, 3890, 3902, 3903), and that,

"The important thing is to get a mature decision, based upon the evidence and the evidence alone, a decision which will be fair and impartial, which will be without passion, without prejudice, and without sympathy (R. 3871).

* * * * *

The case must be decided fairly, without prejudice and without sympathy. That means not only to one side, but to both— fairly, without prejudice or sympathy to either the defendants or to the people of the State of New York—because this requirement is a rule that works both ways. The scales of justice must be kept evenly balanced to see that the rights of both sides are respected. That is what the trial of a case in court, according to the accepted standards, means (R. 3872).

* * * * *

As you sift through the mass of testimony that has gone into the case, in a record approximating a million words, you will seek to bring forth the germs of truth. Decide without fear and favor; see that the rights of both sides are preserved throughout, and to the full extent permissible, without prejudice" (R. 3873).

Jurisdiction to Review.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended; 28 U. S. C. A. Section 344 (b).

In an attempt to bring themselves within the requirements of the statute, petitioners Buchalter and Weiss resort to very adroitly worded statements which we shall prove to be without foundation. Let us first quote what they say.

Buchalter asserts, at page 39, the following:

"The Federal questions herein presented and urged were raised in the State courts, as is evidenced by the statement in the remittitur of the Court of Appeals of the State of New York, as follows:

'Appellant, in his brief and argument, raised the point that he had been denied his constitutional rights under the Fourteenth Amendment to the Constitution of the United States, and this point was considered and necessarily decided by this Court.'

These Federal questions are succinctly set forth in petitioner's brief in support of his motion for a reargument in the Court of Appeals, which is a part of the record before this Court, and which shows that these points were all urged below in the first instance and at first opportunity."

In a similar statement Weiss says, at page 35, that,

"in said Court of Appeals petitioner especially set up and claimed, under the Fourteenth Amendment of the

> Constitution of the United States, the right, privilege and immunity against being deprived by the State of New York of his life and liberty without due process of law 'and', as certified by the Court of Appeals, 'this point was considered and necessarily decided by this Court' (R. 4095), this point having been specifically presented in Buchalter's brief in support of his motion for reargument (R. 4103-4114), which was joined in by petitioner Weiss (R. 4120)."

Capone makes the bald assertion that "the constitutional questions were raised and passed upon in the court below", and, as proof, also cites the remittitur of the Court of Appeals (p. 41).

Now, as to the facts. None of the petitioners, upon whom rests the "burden to show affirmatively" that this Court has jurisdiction (*Gorman* v. *Washington Univ.*, 316 U. S. 98, 101), supports his statement by pointing to any part of the record other than the recital in the remittitur and their brief on the motion for reargument. (See requirements of Rule 12, subd. 1, par. 3 of this Court, Revised Rules adopted Feb. 13, 1939.) The reason for this is that in the courts of first instance, with the sole exception of Capone's claim that under "the Constitution of the United States" he was entitled to a separate trial (R. 36-37), the petitioners never asserted any Federal right. The record of the trial will be searched in vain for a single instance "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the United States" (Judicial Code, sec. 237 (b) as amended). Nor is there any indication that the courts of first instance ever decided a Federal question.

Thus, the first fact is that Buchalter's statement that "the Federal questions herein presented and urged were raised in the State *courts*" and "were all urged below *in the first instance*" is untrue.

We now turn to the proceedings in the Court of Appeals. In that court, petitioners presented every conceivable point

that could be made in their behalf. Buchalter's brief was 166 pages in length (R. 4115). He raised ten points.[13] Of those, he selected only two as involving an alleged Federal question. Those two points dealt with the denial of the motions for a change of venue and the granting of the motion for trial by special jury (Buchalter's Court of Appeals Brief, Points II and III). As to all other points, he made no claim that they presented a denial of a right under the Federal Constitution.

Weiss' brief to the Court of Appeals was 78 pages in length (R. 4115). He raised ten points. In none of them did he assert any Federal right, except that as to the motions for change of venue he adopted and incorporated by reference the argument made in Buchalter's brief (Weiss' Court of Appeals Brief, Point Eighth).

Capone's main and supplemental briefs covered 284 pages (R. 4115). He raised ten points. Of those, the one dealing with rulings on challenges to jurors was presented as involving a denial of a Federal right, and another incorporated by reference Buchalter's argument as to the refusal to change the venue (Capone's Court of Appeals Brief, Points Five and Nine). The remaining points made no reference whatever to the Federal Constitution.

It is also to be noted that the exhaustive majority and dissenting opinions of the Court of Appeals make no mention of any Federal question (R. 4030-4091; 289 N. Y. 181-243).

Consequently, the recital in the remittitur, that "the point" was raised that there was a denial of constitutional rights under the Fourteenth Amendment and that "this point was considered and necessarily decided", must be construed as referring only to the three points where a Federal

13. The briefs on the appeal to the Court of Appeals have not been made part of the record before this Court. In view of petitioners' reliance upon the ambiguous recital in the remittitur, which was filed before the motion for reargument was denied, as supplying the basis for this Court's jurisdiction, it is essential to refer to those briefs to make clear the meaning of the remittitur.

question was raised, namely, denial of motions for change of venue, trial by special jury, and rulings on challenges to jurors.

Buchalter's contention, therefore, that "the Federal questions herein presented and urged were raised in the State courts, *as is evidenced by the statement in the remittitur*", is not in accord with the facts.

Turning to the motion for reargument, it will be recalled that Weiss, after quoting the recital in the remittitur that "this point was considered and necessarily decided", says:

> "This point *having been* specifically presented in Buchalter's brief in support of his motion for reargument (R. 4103-4114), which was joined in by petitioner Weiss."

The quoted statement is misleading, because the remittitur was filed long *before* the motion for reargument was made and decided. The remittitur is dated October 30, 1942 (R. 4091-4098). The motion for reargument was made on November 12, 1942 (R. 4099), and was denied on November 25, 1942 (R. 4120). The remittitur, therefore, cannot possibly be deemed to refer to the alleged Federal questions sought to be raised *for the first time* in the motion for reargument.

Finally, the motion was not entertained, and the memorandum opinion denying it made no reference to any Federal question. Buchalter's contention that the brief in support of his motion for reargument shows that the questions presented "were all urged below in the first instance *and at first opportunity*" does not square with the facts. The motion for reargument was a reiteration of the points originally urged, except that where claim of having been deprived of a Federal right was not made before, it was now supplied as an afterthought. This was undoubtedly done for the purpose of attempting to create a jurisdictional basis for review by this Court.

SUMMARY OF ARGUMENT.

The errors assigned are without merit. They deal with matters which involve only the law of the State of New York, and do not present a Federal question. The recital in the remittitur cannot confer jurisdiction on this Court to review alleged errors concerning which no Federal right was asserted. The claims made in the motion for reargument are worthless as a basis for this Court's jurisdiction, because the motion was denied and the purported Federal questions there raised for the first time were not passed upon.

ARGUMENT.

I.

The guaranty of due process of law does not furnish a right to have decisions of state courts reviewed upon the ground of alleged erroneous findings of fact or erroneous determinations of law concerning state matters. In determining whether there is any basis for the claim that petitioners were denied their constitutional rights "we must remember that the Fourteenth Amendment does not limit the powers of the States to try and deal with crimes committed within their borders, and was not intended to bring to the test of a decision of this Court every ruling made in the course of a State trial". (*Avery* v. *Alabama*, 308 U. S. 444, 446-447.) "This Court is not made, by the laws passed in pursuance of the Constitution, a court of appeal from the highest courts of the states, except to a very limited extent, and for a precisely defined purpose." (*Sauer* v. *New York*, 206 U. S. 536, 546.)

When federal power is invoked to set aside what the highest court of a state regards as a fair trial "it must be plain that a federal right has been invaded". (*Lisenba* v. *California*, 314 U. S. 219, 239.) Such a right is invaded where a defendant in a capital case is denied representation

by counsel (*Powell* v. *Alabama*, 287 U. S. 45), or where by the active conduct or the connivance of the prosecution a conviction is obtained through the use of perjured testimony (*Mooney* v. *Holohan*, 294 U. S. 103) or through the use of a confession wrung from the accused by overpowering his will (*Brown* v. *Mississippi*, 297 U. S. 278; *Chambers* v. *Florida*, 309 U. S. 227), or where the trial is dominated by mob violence in the courtroom, so that there is an actual interference with the course of justice (*Moore* v. *Dempsey*, 261 U. S. 86).

The case at bar is outside the scope of those decisions. Petitioners were represented by able and experienced counsel, who were given ample opportunity to prepare their defense. The trial lasted about eleven weeks. The widest latitude was given in the selection of the jury, which, as we have demonstrated, resulted in obtaining a fair and impartial jury. Equally wide latitude was given to the defense in the cross-examination of the people's witnesses and in summations to the jury. And upon appeal to the Court of Appeals petitioners were given a full and conscientious hearing. In short, at every vital stage of the proceedings due process of law was had.

The criticism directed against the trial judge seems to be based on the notion that trial judges should be reduced to the humiliating position of having no right to say or do anything in a jury trial except to rule in monosyllables on questions presented by counsel, that they should do nothing to guide and control the course of the trial, or to restrain counsel and keep them within bounds, or even prevent them from taking an unfair advantage by misleading the jury by false suggestions and the like.

"The trial judge is," however, "something more than a mere automaton." (*People* v. *Ohanian*, 245 N. Y. 227, 232.) He "is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function, as at common law, is an essential factor in the process for which the Federal Constitution pro-

vides". (*Herron* v. *Southern Pacific R. Co.*, 283 U. S. 91, 95.)

Trial by jury can never be an effective means for administering justice as long as it is characterized by appeals by able advocates to the emotions of untrained men with the judge muzzled and relegated to the side lines and not allowed any substantial part in the trial except to say "yes" or "no" to propositions drafted by counsel and used by them for partisan effect.

The notion that a jury, called upon to render a verdict on disputed facts and subjected to the obfuscating arguments of opposing counsel, are unable to reach a fair decision because the court seeks to help them by analysis and comment is absurd. The court has been trained to understand and clarify factual as well as legal intricacies, penetrate the devices of counsel and observe where the truth is apt to be. To deprive him of the right to aid the jury in arriving at a just verdict on the evidence would emasculate his usefulness. As was said by Dean Ezra Thayer (quoted in Wigmore on Evidence [3rd ed.] sec. 2551-a, p. 510):

> "In a long trial, perhaps involving hard questions of expert judgment, the business of weighing conflicting testimony is a serious task for men unused to analysis or to abstract ideas; and a system which gives full scope to the eloquence of lawyers and then denies the jury the assistance of the only trained and impartial mind in the court room, whatever its excuse in days of royal Tyranny or lay magistrates, is today a senseless perversion."

The criticism of the trial judge for permitting petitioners to be manacled to police officers while being brought to and from the courtroom is certainly unwarranted. Where, as here, the defendants on trial for murder are desperate and dangerous criminals, such precautions must be taken to prevent their escape. (*Kelly* v. *Oregon*, 273 U. S. 589; *State* v. *Temple*, 194 Mo. 237; *People* v. *Kimball*, 5 Cal. Rep. [2d] 608.) It is specious to contend that by so doing

their constitutional rights were violated. The words of Judge Cooley, a great judicial interpreter of the organic law, are quite pertinent. He said (*People* v. *Murray*, 52 Mich. 291):

> "I do not understand that the Constitution is an instrument to play fast and loose with in criminal cases, any more than in any others; or that it is the business of Courts to be astute in the discovery of technical difficulties in the punishment of parties for their criminal conduct."

And this Court in a situation analogous to the one at bar said (*Kelly* v. *Oregon*, 273 U. S. 589, 591):

> "Another assignment of error is to the fact that the plaintiff in error was constantly in the custody of the warden of the penitentiary, inside and outside of the court room, during the trial. It is argued that he was entitled to be free from any custody, in order that he might fully make his defense, and that this deprived him of due process. It is a new meaning attached to the requirement of due process of law that one who is serving in the penitentiary for a felony and while there commits a capital offense must, in order to secure a fair trial, be entirely free from custody (citing cases). There is no showing that he had not full opportunity to consult with counsel or that he was in any way prevented from securing needed witnesses. The assignment is wholly without merit."[14]

The same is true of the complaint against the presence of detectives in the courtroom when the people's witnesses were testifying. We have already stated the facts controlling this situation. It is pertinent here to quote the considered judgment of an eminent committee of the American Bar Association in their report on "Improvements In The Law

14. It is to be remembered that at the trial Buchalter and Weiss were Federal prisoners.

of Evidence (Reports of the Section of Judicial Administration at Annual Meeting for July 25-27, 1938):

> "10. *Intimidation of Witnesses.*
>
> In most of the large cities there is probably more or less intimidation of witnesses in felony cases. This, when it exists, is the supreme disgrace of our justice. It is well-known to all that the success of the 'racket' is due chiefly to the lack of proof caused by the intimidation of witnesses. This intimidation takes place either in the court premises or outside of them.
>
> (A) In the *court premises* it is the duty of the judge to install arrangements for protecting the witnesses, and also to instruct and require his bailiffs to exclude from the courtroom and its premises known bullies and touts. All this part of the remedy comes home to the judge's responsibility."

II.

We further maintain that, apart from the lack of merit to the points raised by petitioners, none of the questions presented is reviewable.

1. The denial of the motions for a change of venue does not involve a Federal question. "Matters of this sort are addressed to the discretion of the trial judge" (*Stroud* v. *United States*, 215 U. S. 15, 20), and where the decision is that of a state court it is not subject to review here (*Barrington* v. *Missouri*, 205 U. S. 483; *Thomas* v. *Texas*, 212 U. S. 278, 281-282.) In the *Barrington* case, just cited, the defendant applied for a change of venue on the ground of local prejudice. His motion was denied, and he was convicted of murder in the first degree. This Court in dismissing his application to review for want of jurisdiction said (p. 485):

> "*In our judgment no Federal question was involved.* Were this otherwise it would follow that we could de-

> cide in any case that the trial court had abused its discretion under the laws of the state, although the supreme court of that state had held to the contrary."

2. The same holds true of the denial of Capone's motion for a severance and of the motions for a three-month adjournment. "In the course of trial, * * *, many procedural questions necessarily arise which must be decided by the trial judge in the light of facts then presented and conditions then existing. Disposition of a request for a continuance is of this nature and is made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed." (*Avery* v. *Alabama*, 308 U. S. 444, 446; *Franklin* v. *South Carolina*, 218 U. S. 161, 168.)

In *Davis* v. *Texas*, 139 U. S. 651, the defendant was convicted of murder. In dismissing a writ of error this Court said (pp. 652-653):

> "The fifth error relates to the action of the trial court in refusing a continuance, and the sixth, to the action of that court in respect to that refusal upon the motion for a new trial. * * * It was for the court of appeals to determine whether the discretionary power of the trial court had been so abused as to amount to error, and whether its reconsideration, upon the motion for a new trial, of the refusal to continue called for revision. * * * *The matter was for the state courts to decide, and their action presents no federal question.*"

3. We have demonstrated in our statement of the facts that a fair and impartial jury was impanneled. Petitioners also contend that by reason of alleged erroneous rulings on challenges for cause to jurors who were excused peremptorily, they were improperly compelled to exhaust their peremptory challenges. This contention does not present a Federal question, even though the last two trial jurors were selected after petitioners had used up their thirty peremptory challenges. (*Spies* v. *Illinois*, 123 U. S. 131, 168-180.) As was said in *Brown* v. *New Jersey*, 175 U. S. 172, 175):

> "* * * the purpose of criminal procedure is not to enable the defendant to select jurors, but to secure an impartial jury. 'The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. *Northern P. R. Co.* v. *Herbert*, 116 U. S. 642. The right to challenge is the right to reject, not to select, a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained' *Hayes* v. *Missouri*, 120 U. S. 68, 71."

4. The charge to the jury did not present any Federal question. No claim was made at the trial that it violated the Federal Constitution. Nor was any such claim made or decided by the Court of Appeals. The charge, therefore, is not reviewable here. As stated in *Franklin* v. *South Carolina*, 218 U. S. 161, 172.

> "The supreme court of South Carolina considered and overruled certain grounds of appeal, which embrace objections to the charge. But we do not find in these rulings any determination of Federal questions adverse to plaintiff in error which would warrant a reversal by this court. *These rulings were upon questions of general law, concerning which no Federal right was asserted and denied, as is essential to enable this court to review the judgment of a state court.*"

5. Finally, it is to be remembered that the prop upon which this Court's jurisdiction is invoked is the vague recital in the remittitur and the briefs submitted on the motion for reargument.

The remittitur, however, cannot confer jurisdiction to review questions which were not raised. (*Honeyman* v. *Hanan*, 300 U. S. 14; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 244.) Obviously, "a point that was never raised cannot be said to have been decided adversely to a party who never set it up or in any way alluded to it". (*Dewey* v. *Des Moines*, 173 U. S. 193, 200.) Since in the case at

bar the alleged errors concerning the conduct of the trial were never set up or claimed to be in violation of the Federal Constitution, the recital in the remittitur can have no bearing at all as to them. For it is settled law that "the certificate of a court of last resort of a State may not import a Federal question into a record where otherwise such question does not arise". (*Rector* v. *City Deposit Bank Co.*, 200 U. S. 405.) As this Court said quite recently (*Honeyman* v. *Hanan*, *supra*, 300 U. S. at p. 22):

> "Thus the true function of a certificate or statement of a state court, by way of amendment of, or addition to, the record, is to aid in the understanding of the record, to clarify it by defining the Federal question with reasonable precision and by showing how the question was raised and decided, so that this Court upon the record as thus clarified may be able to see that the Federal question was properly raised and was necessarily determined."

As to the motion for rearguument, which was denied without passing upon the alleged Federal questions there raised for the first time, it suffices to say:

> "This court has decided many times that it is too late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a state after that court has pronounced its final decision. *Locher* v. *Schroeder*, 149 U. S. 580, 585; *Pim* v. *St. Louis*, 165 U. S. 273. It is true that we have also decided that, if the court entertains the motion and passes on the Federal question, we will review its decision. But it must appear that the court has done so."
>
> *McCorquodale* v. *Texas*, 211 U. S. 432, 437.
> *Forbes* v. *State Council of Virginia*, 216 U. S. 396, 399.

III.

The petitions for writs of certiorari should be denied.

Respectfully submitted,

THOMAS CRADOCK HUGHES,
Acting District Attorney,
Kings County, N. Y.

HENRY J. WALSH,
SOLOMON A. KLEIN,
Assistant District Attorneys,
Of Counsel.

Appendix.

Affidavit for Special Jury and Trial Date.

COUNTY COURT—KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs.

—against—

LOUIS BUCHALTER, alias "Lepke"; EMANUEL WEISS, alias "Mendy Weiss"; HARRY STRAUSS, alias "Pittsburgh Phil"; JAMES FERACO; PHILIP COHEN, alias "Little Farvel"; LOUIS CAPONE,

Defendants.

Indictment No. 23855.

STATE OF NEW YORK, }
CITY OF NEW YORK, } ss.:
COUNTY OF KINGS, }

SOLOMON A. KLEIN, being duly sworn, deposes and says:

That he is an Assistant District Attorney in the office of the District Attorney of Kings County and that the sources of his information and the grounds of his belief are the records and files of said office.

An indictment, No. 23855, was filed in the County Court of Kings County, on May 28, 1940, charging the above named defendants with the crime of Murder in the First Degree for the killing of one Joseph Rosen on September 13, 1936, by shooting and killing him with revolvers. A copy of said indictment is hereto annexed and marked "A".

On May 28, 1940, the defendants Capone and Strauss

were arraigned in the County Court of Kings County and entered separate pleas of not guilty to the said indictment. The defendant Strauss has recently been electrocuted for the commission of another murder. The defendant Feraco has as yet not been apprehended. On December 2, 1940, the defendant Cohen was arraigned in the County Court of Kings County and entered a plea of not guilty to the said indictment. On April 11, 1941, the defendant Weiss was arraigned in the said court and likewise entered a plea of not guilty. On May 29, 1941, the defendant Buchalter was arraigned in the said court and a plea of not guilty was entered for him.

The District Attorney intends to move the trial of the said indictment in the County Court of Kings County, Part II., before Hon. Franklin Taylor, not later than July 14, 1941.

Deponent is fully familiar with the facts and circumstances involved in the case against the aforesaid defendants and states that a special jury is required to try the issues for the following reasons:

The case is one of great importance and intricacy, involving proof that the defendants are guilty of the crime of Murder in the First Degree, committed with premeditation, deliberation and intent. This proof consists not only of voluminous and complicated testimony by lay witnesses, but also of expert testimony of a technical nature. The trial will also involve intricate and unusual questions of law. In addition to the complicated questions of fact and intricate questions of law, the circumstances concerning the case are such as to render it one of extreme importance both from the standpoint of the people as well as of the defendants.

Deponent further states and fully believes that the due, impartial and efficient administration of justice in this case will be advanced by having the trial herein before a special jury instead of an ordinary jury.

That no previous application for the relief herein sought has been made.

WHEREFORE, deponent prays for an order directing that the trial herein be had before a special jury in accordance with the statute in such case made and provided, and for such other and further relief as the court may deem just and proper.

SOLOMON A. KLEIN.

Sworn to before me this
23rd day of June, 1941.

CHARLES T. SCHACK
Notary Public
Kings County.

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

I, FRANCIS J. SINNOTT, Clerk of the County of Kings, and Clerk of the County Court in and for said County (said Court being a Court of Record) DO HEREBY CERTIFY that I have compared the annexed with the original Motion for Special Jury filed in my office June 26, 1941, and that the same is a true transcript thereof and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunder set my hand and affixed the seal of said County and Court, this 30th day of December, 1942.

FRANCIS J. SINNOTT, Clerk.

Buchalter's Answering Affidavit.

COUNTY COURT—KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs.

—against—

LOUIS BUCHALTER, alias "Lepke"; EMANUEL WEISS, alias "Mendy Weiss"; HARRY STRAUSS, alias "Pittsburgh Phil"; JAMES FERACO; PHILIP COHEN, alias "Little Farvel"; LOUIS CAPONE,

Defendants.

Indictment No. 23855.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

HYMAN BARSHAY, being duly sworn, deposes and says:

1. I am an attorney admitted to practice in the State of New York.

2. On May 28, 1941, I was retained as counsel for the defendant, LOUIS BUCHALTER.

3. On that day I filed a special notice of appearance on behalf of that defendant, my client.

4. On behalf of the defendant, LOUIS BUCHALTER, the jurisdiction of this Court to try him under the pending indictment has been questioned and a proceeding is now pending in the United States Courts wherein the question of the jurisdiction of this Court to try that defendant under the indictment referred to in the caption herein is sought to be questioned.

5. Reference is made to the question of the jurisdiction of this Court only for the purpose of indicating that my appearance in limited opposition to this motion is not to be construed as a waiver of the contention heretofore asserted on behalf of that defendant that this Court is without jurisdiction to try that defendant under this indictment.

6. No objection is made on behalf of my client to that aspect of the motion which seeks an order for the trial of this case before a special jury.

7. I note, however, from the affidavit of Solomon A. Klein, submitted in support of the motion, that the District Attorney intends to move the trial of this case "not later than July 14, 1941". I oppose that aspect of this motion and for the following reasons:

I cannot be adequately prepared on behalf of my client for the trial of this action on July 14, 1941.

As heretofore stated, I was retained on behalf of the defendant, LOUIS BUCHALTER, on May 28, 1941. Nevertheless, I was not permitted to confer with him until June 17, 1941.

The defendant, LOUIS BUCHALTER, is in the custody of the Attorney General of the United States. The Director of Federal Prisons, Mr. James V. Bennett on May 30, 1941, informed my associates in this case, that I would not be permitted to consult with the defendant. That announcement was made by telegram addressed to J. Bertram Wegman, the contents of which stated:

> "Regret we cannot permit Mr. Barshay interview Buchalter."

Thereafter, on return of a writ of habeas corpus issued by the United States District Court for the Southern District of New York, as I am informed, the United States District Court for the Southern District of New York, instructed an Assistant United States Attorney in the office of the United States Attorney for the Southern District of

New York, to obtain the consent of the Federal Director of Prisons for permission to allow me to see my client. I was afforded that opportunity for the first time on June 17, 1941.

8. My client, LOUIS BUCHALTER, is charged with murder in the first degree and the affidavit of Solomon A. Klein, submitted in support of this motion, states that this case "is one of great importance and intricacy, involving proof that the defendants are guilty of the crime of Murder in the First Degree, committed with premeditation, deliberation and intent. This proof consists not only of voluminous and complicated testimony by lay witnesses, but also of expert testimony of a technical nature. The trial will also involve intricate and unusual questions of law. In addition to the complicated questions of fact and intricate questions of law, the circumstances concerning the case are such as to render it one of extreme importance both from the stand point of the people as well as of the defendants".

9. I cannot prepare this case for trial in less than a month. There are only twenty-two working days between June 17, 1941, the day when I was permitted access to my client, and July 14, 1941, the day when the District Attorney seeks to set as the date of trial. I respectfully submit that in view of the complicated nature of this case as proved by the District Attorney himself, through the affidavit of his assistant, it is physically impossible to prepare the case in that time.

10. I have spoken to the defendant personally on three occasions since June 17, 1941. The facilities at the Jail at best are insufficient for long conferences. Other prisoners are entitled to the use of the same counsel room and a two hour stay is the longest for one day, without trespassing on the time of others. There are thousands of pages of testimony of other trials that I must read. There are numberless witnesses that I must interview both in and out of town. Even the help of my associates is insufficient to

properly prepare in so short a time. Intricate questions of law must be searched and prepared. The Court will understand the many things necessary to be done in a case of this magnitude. This time of the year many people take vacations and it therefore takes a longer time to reach them. Their convenience must be served as well as mine. I have already encountered three such situations in this case.

11. If it is impossible to prepare the case within that time, the setting of the date by the District Attorney involves the imposition of a gross injustice upon my client and great hardship upon me. As the situation is posed by the District Attorney's moving affidavit, the District Attorney has worked on this case and has had for the purposes of preparation, a period of at least fifteen months. The District Attorney asserts, by necessary implication, that I ought to be required to complete my preparation for the defense in twenty-two working days. I am certain the District Attorney does not want any man on trial for his life to be represented by counsel inadequately prepared to try the case.

12. No reason is given in the moving affidavit as to the necessity of trying this intricate, important and involved case before a special jury in the midst of the summer. No tenable reason could be proffered in support of that aspect of this application. If it be said, as it formerly has been said in informal discussion that the trial must proceed on that date by reason of the insistence of subordinates of the United States Attorney General, then I respectfully submit that I ought have an opportunity to solicit an expression of opinion from the United States Attorney General or his subordinates. I am reasonably certain that the Attorney General of the United States can be made to understand that the trial of a State murder case should not be had under conditions which would deprive the defendant of a reasonable opportunity to prepare his defense. This defendant is in a sense the ward of the Attorney General. I

am certain that the Attorney General or any of his subordinates would want that the defendant be given an opportunity for the preparation of his defense.

13. I respectfully request that the trial of this case be set for a day not earlier than the first week of September. All of the intervening interval between that date and today is needed for the preparation of the defense.

HYMAN BARSHAY.

Sworn to before me this
25th day of June, 1941.

HARRIET COHEN
Notary Public
Kings County.

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

I, FRANCIS J. SINNOTT, Clerk of the County of Kings, and Clerk of the County Court in and for said County (said Court being a Court of Record) DO HEREBY CERTIFY that I have compared the annexed with the original affidavit filed in my office June 26, 1941, and that the same is a true transcript thereof and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunder set my hand and affixed the seal of said County and Court, this 30th day of December, 1942.

FRANCIS J. SINNOTT, Clerk.

Weiss' Answering Affidavit.

COUNTY COURT—KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

—against—

LOUIS BUCHALTER, alias "Lepke"; EMANUEL WEISS, alias "Mendy Weiss"; HARRY STRAUSS, alias "Pittsburgh Phil"; JAMES FERACO; PHILIP COHEN, alias "Little Farvel"; LOUIS CAPONE,

Defendants.

Indictment No. 23855.

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

JAMES I. CUFF, being duly sworn deposes and says that he is the attorney for EMANUEL WEISS, one of the defendants in the above entitled indictment, and your deponent has been retained to represent the said defendant as trial counsel in the trial of the indictment against him.

That deponent was retained by the said defendant on June 11, 1941, and duly filed his Notice of Appearance in the Office of the Clerk of the County Court, Kings County on June 12, 1941.

That deponent does not oppose the application for the trial of the indictment before a special jury, but deponent does oppose that part of the application which seeks to have the trial set for July 14, 1941, for the reason that it will be physically impossible for deponent to properly prepare the case for trial in the limited time at deponent's disposal.

Since deponent was retained in this case he had prior commitments for trials in the Supreme Court which oc-

cupied most of his time, and practically the only time that deponent has been able to devote to the case since June 12, 1941, up to the present time was during the evenings, except for the few times that deponent has been able to interview his client in the Federal Detention Prison at 427 West Street, Borough of Manhattan, City of New York.

The proper preparation of this case for trial will involve the interviewing of a very large number of possible witnesses and the examination of voluminous documents and records of other trials in which deponent believes that many of the witnesses that will be called on this trial appeared as witnesses and gave testimony.

Deponent intends to devote himself exclusively to the preparation of this case between now and the time that it is reached for trial, but from what deponent has ascertained to date has firmly convinced him that there will not be sufficient time at his disposal to do the work that it will be necessary for him to do in order that the defendant's interests may be properly, fully and sufficiently protected at the trial and his defense properly and fully presented.

Deponent believes that this Court might take judicial notice of the fact that the case is one of great importance, and that it is such as to require a tremendous amount of time and labor in order that the defendant's interests might be fully protected and his defense fully presented at the trial.

Indeed, the affidavit of Mr. Klein submitted in support of the application states that the proof to be submitted on behalf of the prosecution consists of voluminous and complicated testimony of lay witnesses and in addition there will be expert testimony of a technical nature. He also states that the trial will involve intricate and unusual questions of law. In this deponent agrees with Mr. Klein and wishes to add that in so stating he puts the case very mildly.

Deponent's sole desire is to see that his client's interests are fully and properly protected and this cannot be done unless deponent has sufficient time to make the necessary investigations and interview all of the persons who might

be called as witnesses on behalf of deponent's client, and deponent is certain that there will not be sufficient time at his disposal even if he should devote himself exclusively to this work day and night until July 14, 1941.

The affidavit of the District Attorney does not present any good or sufficient reason why it should be necessary to start the trial of this case on July 14, 1941, and deponent submits that it will not be for the best interests of the defendant to have the case tried a the time specified which will be during the very hottest period of the summer.

WHEREFORE deponent asks that in considering this motion that the Court give due consideration to the situation in which deponent finds himself, and to the utter impossibility of deponent properly preparing the case of his client for trial in the limited time at his disposal, and deponent respectfully asks that the case be set down for trial for some time in the month of September, at which time deponent will be properly prepared for the trial.

JAMES I. CUFF.

Sworn to before me this
25th day of June, 1941.

CLAIRE SCHUTZ
Notary Public
Queens County.

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

I, FRANCIS J. SINNOTT, Clerk of the County of Kings, and Clerk of the County Court in and for said County (said Court being a Court of Record) DO HEREBY CERTIFY that I have compared the annexed with the original affidavit filed in my office June 26, 1941, and that the same is a true transcript thereof and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunder set my hand and affixed the seal of said County and Court, this 30th day of December, 1942.

FRANCIS J. SINNOTT, Clerk

Order Granting Motion for Special Jury.

At a Term, Part I, of the County Court of Kings County held at the Court House thereof, 129 Schermerhorn Street, Borough of Brooklyn, City of New York, on the 2nd day of July, 1941.

Present: Hon. PETER J. BRANCATO, County Judge.

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

—against—

LOUIS BUCHALTER, alias "Lepke"; EMANUEL WEISS, alias "Mendy Weiss"; HARRY STRAUSS, alias "Pittsburgh Phil"; JAMES FERACO; PHILIP COHEN, alias "Little Farvel"; LOUIS CAPONE,

Defendants.

Indictment No. 23855.

The plaintiffs having applied to this court for a special jury to try the issues arising in the above entitled action and the said motion having duly come on and been heard on June 26, 1941, and the District Attorney of Kings County, by Burton B. Turkus, Assistant District Attorney, of counsel, having appeared in support thereof, and Hyman Barshay, Esq., attorney for the defendant, Louis Buchalter, alias "Lepke"; James L. Cuff, Esq., attorney for the defendant, Emanuel Weiss, alias "Mendy Weiss"; Saul Price, Esq., attorney for the defendant, Philip Cohen, alias "Little Farvel", and Leon Fischbein, Esq., attorney for the defendant, Louis Capone, appearing and consenting to the grant-

ing of the motion for a special jury but opposing the trial date, namely, July 14, 1941, and due deliberation having been had,

NOW on reading and filing the notice of motion dated June 23, 1941; the affidavit of Solomon A. Klein, duly verified June 23, 1941; a copy of the indictment herein and the pleas thereto, and on proof of due and timely service of the said notice of motion and affidavit, submitted in support of said motion, and upon all other papers and proceedings heretofore had herein, it is on motion of William O'Dwyer, District Attorney of Kings County,

ORDERED, that the said motion be, and the same hereby is, in all respects granted and that a special jury be empanelled to try the issues arising upon the above entitled action and that the trial of the above entitled action be had before such special jury, and it is further

ORDERED, that the said special jury shall be drawn pursuant to the provisions of the statute in such case made and provided at the Office of the County Clerk, Department of Jurors, Room 407, Municipal Building, Borough of Brooklyn, City of New York, on July 8, 1941, at 9:30 A. M., and that the number of such special jurors to be drawn shall be 250 and they shall be required to attend a Trial Term, Part II., of the County Court of Kings County, before the Hon. Franklin Taylor, County Judge, on August 4, 1941, and upon such subsequent days as they may be directed by the court.

Enter:

PETER J. BRANCATO,
County Judge.

Granted
Jul. 2, 1941

FRANCIS J. SINNOTT
Clerk.

STATE OF NEW YORK, }
COUNTY OF KINGS, } ss.:

I, FRANCIS J. SINNOTT, Clerk of the County of Kings, and Clerk of the County Court in and for said County (said Court being a Court of Record) DO HEREBY CERTIFY that I have compared the annexed with the original Order filed in my office July 21, 1941, and that the same is a true transcript thereof and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunder set my hand and affixed the seal of said County and Court, this 30th day of December, 1942.

FRANCIS J. SINNOTT, Clerk.

Section 377 New York Code of Criminal Procedure.

"§ 377. Grounds of challenge for implied bias.

A challenge for implied bias may be taken for all or any of the following causes, and for no other:

1. Consanguinity or affinity within the ninth degree, to the person alleged to be injured by the crime charged, or on whose complaint the prosecution was instituted, or to the defendant;

2. Bearing to him the relation of guardian or ward, attorney or client, or client of the attorney or counsel for the people or defendant, master or servant, or landlord or tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted, or in his employment on wages;

3. Being a party adverse to the defendant in a civil action or having complained against, or been accused by him in a criminal prosecution;

4. Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of a person whose death is the subject of the indictment;

5. Having served on a trial jury, which has tried another person for the crime charged in the indictment;

6. Having been one of a jury formerly sworn to try the same indictment, and whose verdict was set aside or which was discharged without a verdict, after the cause was submitted to it;

7. Having served as a juror, in a civil action brought against the defendant, for the act charged as a crime;

8. If the crime charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he shall neither be permitted nor compelled to serve as a juror." (L. 1881, ch. 442, sec. 377 in effect Sep't. 1, 1881.)